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No. ———

Supreme Court of the United States

OCTOBER TERM, 1948.

LOIE L. BRUCE,
Petitioner,

VERSUS

THE OHIO OIL COMPANY, and
RAMSEY PETROLEUM CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND SUPPORTING BRIEF.

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Justices of the Supreme Court of the United States:

The above-named petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

On March 13, 1923, the respondent and her husband, as lessors, executed to the English Drilling & Producing Company, a corporation, as lessee, an oil and gas lease

covering the Southwest Quarter (SW¼) of the Northeast Quarter (NE¼) of Section 11, Township 5 North, Range 9 West, Caddo County, Oklahoma, containing forty (40) acres, more or less (R. 7-12). In due course, by assignment, the respondents acquired said lease as applied to the West Half (W½) of the Southwest Quarter (SW¼) of the Northeast Quarter (NE¼), and the Southeast Quarter (SE¼) of the Southwest Quarter (SW¼) of the Northeast Quarter (NE¼)—30 acres (R. 27).

On May 4, 1944, the petitioner had an action pending against the respondents in the District Court of Oklahoma County, State of Oklahoma, wherein she sought to recover a judgment against them for drainage of her aforesaid forty (40) acres. A settlement of that action was made between the parties thereto, resulting in what is referred to in the record as the letter agreement of May 4, 1944 (R. 17-19). In connection with this letter agreement, and on May 15, 1944, the respondent, a widow (her husband having died), as lessor, executed and delivered to the respondents, as lessees, an oil and gas lease covering the Northeast Quarter (NE¼) of the Southwest Quarter (SW¼) of the Northeast Quarter (NE¼) of Section 11, Township 5 North, Range 9 West, Caddo County, Oklahoma, containing ten (10) acres (R. 12-17). This lease, plus the aforesaid 30-acre lease, gave to respondents oil and gas leases covering petitioner's entire forty (40) acres.

Sale letter agreement and 10-acre lease constitute the contract between the parties as to the settlement of said

action. Upon the execution and delivery of said letter agreement and 10-acre lease the respondents paid to the petitioner $12,500.00 in cash and agreed to pay her $12,-500.00 out of 1/8 of 7/8 of the oil or gas production from sands below the Wade Sand, as provided for in said letter agreement and lease. In this connection we quote the following from said letter agreement:

> "Notwithstanding any provision herein contained to the contrary, the drilling of a well and the production of oil or gas below the Wade Sand formation from any part of the SW1/4 of NE1/4 of Section 11-5N-9W, shall have the same force and effect to perpetuate the life of this lease as if said well had been actually drilled on the NE1/4 SW1/4 NE1/4 of Section 11-5N-9W; and as an additional consideration, the lessor shall be entitled to receive out of, and only out of 1/8th of 7/8ths of the oil or gas from all sands only below the Wade Sand that may be produced from or allocated to said ten acres as being produced from said ten acres (NE1/4 SW1/4 NE1/4 of Section 11-5N-9W), as a part of the SW1/4 of NE1/4 of Section 11-5N-9W, when unitized, or any other unitized area that may be necessary in order to drill or produce oil or gas from the lands in the area in which said ten acres is located, under the State or Federal laws, rules and regulations, and only if, as and when produced, until the sum of $12,500.00 shall have been paid the lessor, her heirs, executors, administrators or assigns" (R. 18).

Said 10-acre lease contains the identical language above quoted from said letter agreement (R. 15-16). In addition to the foregoing quoted portion of said letter agreement we quote Paragraphs 2, 3 and 4 thereof:

"2. Upon the execution and delivery of said oil and gas lease by you, as provided above, Ramsey Petroleum Corporation and The Ohio Oil Company shall immediately begin to use their best efforts to obtain a permit from the Petroleum Administrator for War to drill a well on some part of said SW¼ of NE¼ of Section 11-5N-9W, prospecting for oil below the Wade Sand and agree to commence operations for the drilling of said well within six months from the date they shall have obtained from the Petroleum Administrator for War a permit to drill said well.

"3. In consideration of the foregoing, you agree to dismiss the suit now pending in the District Court of Oklahoma County, entitled *Loie L. Bruce* v *The Ohio Oil Company and Ramsey Petroleum Corporation*, being case No. 108,191, with prejudice, and that you agree to make no further claim or claims for present or future damages against the defendants above named, or their successors and assigns, for alleged damages sustained by you by reason of the alleged drainage of oil and gas from the SW¼ of NE¼ of Section 11-5N-9W, from any well or wells that have been completed on lands adjoining the SW¼ NE¼ of Section 11-5N-9W.

"4. That in the event the drilling of the above mentioned proposed well below the Wade Sand should result in a gas well that you will join in any unitization agreement that may be necessary to be executed by the royalty owners in order to unitize the required number of acres or area from which gas may be produced and marketed by the authority that may be required to be obtained from the U. S. Petroleum Administrator for War, or any other State or Federal authority for the production of gas from said well" (R. 18-19).

On May 15, 1944, the date of said 10-acre lease, the petitioner was the owner of said forty acres, subject only to said two leases—the thirty and ten acre leases. There was no gas production of any kind from said forty acres but there was some oil production therefrom.

On June 7, 1944, the respondents, as lessees in each of said two leases, filed an application with the Petroleum Administrator for War (PAW), Washington, D. C., for authority to drill an oil well upon said forty acres. A map of the East Cement Field was submitted and made a part of said application. A copy of this application, exclusive of said map, appears in the record at Pages 60 to 63. This application covers and includes two 40-acre leases (the one the Bert Lackey lease covering the SE¼ NW¼, Section 11-5N-9W, and the other the H. T. Bruce lease covering the SW¼ NE¼, Section 11-5N-9W—R. 60-63 and 64).

On June 17, 1944, authority was granted to drill an oil well on each of said forty-acre leases (the Bruce and the Lackey). This order is as follows:

> "Pursuant to paragraph (m) of PAO-11, as amended January 1, 1944, you are hereby authorized to use the material required to drill and complete at depths greater than the base of the Wade Sand, one well in the SW SE NW Section 11-5N-9W, and one well in the SW SW NE Section 11-5N-9W, East Cement Field, Caddo County, Oklahoma, at the locations designated in your application, provided that:
>
> "(1) With respect to all pools below the base of the Wade Sand and disregarding wells drilling to or producible from all pools above the base of the Wade Sand, each well is drilled on a drilling unit consisting

of a quarter-quarter section and in conformity with the provisions of subparagraph (f) (3) of PAO-11, as amended January 1, 1944, and

"(2) Each well is not plugged back and completed or recompleted in any pool above the base of the Wade Sand" (R. 31).

The Lackey 40-acre lease adjoins the Bruce 40-acre leases on the West, and at the time of the making of said application and order the respondents owned an oil and gas lease covering both the Lackey and the Bruce forty acres. In said order the respondents were authorized to drill an oil well on each of said two 40-acre tracts—the Lackey and the Bruce.

On September 7, 1944, the respondents, as the lessees in each of said Bruce leases (the 30 and the 10 acres), pursuant to said order, commenced the drilling of an oil well on the Bruce 40 acres and completed the drilling thereof as a gas well on or about May 5, 1945, no oil being found (R. 46 and 153-157). Since gas was found rather than oil said well was shut in and could not be completed and produced as a gas well under said order of June 17, 1944. This well is known in the record as Bruce No. 8.

On May 22, 1945, the respondents filed an application before the PAW for permission to complete and produce said Bruce No. 8 as a gas well. This well is referred to in Paragraph 3-B thereof as the Bruce No. 8. There was another well involved in this application known as the Ohio No. 20 Paukune, referred to in Paragraph 3-A thereof. A

copy of this application, exclusive of the map referred to in Paragraph 5 thereof, appears in the record at Pages 66 to 72.

On June 29, 1945, the PAW approved said application as to each of the wells involved therein, including the Bruce. The language of this order is:

> "Pursuant to paragraph (m) of Petroleum Administrative Order No. 11, you are hereby authorized to use material as requested in your application dated May 22, 1945, required to produce wells located in the SW/4 SE/4 of Section 3, Township 5 North, Range 9 West, and in the SW/4 SW/4 NE/4 of Section 11, Township 11, Township 5 North, Range 9 West, Caddo County, Oklahoma, in the manner proposed, provided that all property interests in the eighty-acre tracts upon which each well is located, as designated on the plat submitted with the application, are consolidated and assigned to that well" (R. 73).

The respondents, as lessees, in said application, seek to unite the Bruce forty acres with the Lackey forty acres as an eighty-acre unit. In support of their application to so unite these two forty acre tracts and complete the Bruce No. 8 well and produce it as a gas well they say, among other things:

> "Ramsey No. 1-A Cobb-Covey, SW NE SW Section 11. This well encountered the following reservoirs: Culp 6160-6330, in which it was completed September, 1944, for an open flow of 2½ million cu. ft. of gas per day; Melton 6459-6650, Upper Kistler 6998-7020, and Lower Kistler 7260-7290. The last three mentioned reservoirs were tested but did not show commercial production.

* * * * * * * *

"4-B. From the location of the above-listed wells in the vicinity of the Ohio No. 8 Bruce, it is evident that no regular spacing pattern has been followed in the development of the gas in this part of the East Cement field. In view of the high cost of drilling and the scarcity of critical well materials, the applicant desires an 80-acre spacing unit for the Bruce No. 8. It will be noted that without such spacing unit, The Ohio Oil Company could be forced to drill an offset to the English Cobb-Covey. In making application for this 80-acre spacing unit for Bruce No. 8, the applicant is also requesting authorization to complete this well in the three reservoirs mentioned in 3-B above, namely the Melton, Upper Kistler, and Lower Kistler.

"Also it will be noted from the detailed description of the surrounding wells that many of these are and have been producing from these reservoirs for many years. Therefore, in order to protect leasehold and royalty rights, this well should be produced from all reservoirs. Another reason for making application to produce this well is the fact that the Little Nick No. 4 Rigney has been blowing wild since July, 1944, and is undoubtedly dissipating the gas from all the reservoirs penetrated in the No. 8 Bruce.

* * * * * * * *

"7 (d) In connection with Ohio No. 8 Bruce, this well is shut in with drainage from its reservoirs through existing wells, most of which are not subject to any Federal regulation as to well spacing, except in the case of the Ramsey No. 1-A Cobb-Covey, which is producing on a 40-acre unit under P. A. W. authorization" (R. 69-72).

In said application of May 22, 1945, reference is made to the Ramsey No. 1-A Cobb-Covey well being drilled on

the Southwest Quarter (SW¼) of the Northeast Quarter (NE¼) of the Southwest Quarter (SW¼) of Section 11, Township 5 North, Range 9 West, Caddo County. Prior to the making of said application, and on March 7, 1944, an application was made to the PAW for permission to drill an oil well on the Northeast Quarter (NE¼) of the Southwest Quarter (SW¼) of Section 11, Township 5 North, Range 9 West, Caddo County, Oklahoma—40 acres (Ramsey No. 1-A Cobb-Covey Well). This application was granted, and pursuant thereto the well was drilled to a depth of 7,321 feet and completed on August 29, 1944, as a gas well, no oil being found. Following this, and on October 16, 1944, an application was made to said PAW to complete this well as a gas well and produce it as such (R. 109-110). On November 2, 1944, the application was granted and an order made authorizing the completion of said well as a gas well, which order, among other things, provides:

> "Pursuant to the provisions of paragraph (m) of Petroleum Administrative Order No. 11, as amended July 1, 1944, you are hereby authorized to connect and produce your Ramsey-Gorton Cobb-Covey gas well No. 1-A located in the center of the Southwest Quarter of the Northeast Quarter of the Southwest Quarter of Section 11, Township 5 North, Range 9 West, Caddo County, East Cement Field, Oklahoma, in the manner proposed in your application."

This 40-acre tract adjoins the Lackey forty acres on the South and corners with the Bruce forty acres.

After the making of said order of June 29, 1945, the respondents completed said Bruce No. 8 as a gas well. The

first gas production therefrom was marketed on October 6, 1945. After the making of this order the respondents prepared and submitted to the petitioner a Communitization Agreement purporting to unite her two leases covering her forty acres with the Lackey 40-acre lease, making a unit lease of eighty acres. Said purported agreement bears date July 25, 1945. She declined to sign it. A copy of this purported agreement appears in the record at Pages 20 to 22.

The respondents owned the entire working interest in the leases covering each of said 40-acre tracts, the Bruce and the Lackey. The regular gas royalty under each of the Bruce leases (the 30 acres and the 10) is ⅛ (R. 9-13). The Lackey 40-acre lease provides for a flat gas royalty of $250.00 per year (R. 146). The proposed agreement changes the gas royalty provision of the Lackey lease from a flat royalty of $250.00 per year to ½ of ⅛ royalty from the 80-acre unit lease, and reduces the royalty provisions of the two Bruce leases one-half. The proposed agreement has the effect of favoring the Lackey royalty owners to the prejudice and at the expense of the petitioner. Aside from this the uniting of the two forties, the Lackey and the Bruce, as an 80-acre unit is beneficial to the respondents and to the prejudice of the petitioner.

This action was commenced in the State District Court on April 6, 1946, and in due course was removed to the United States District Court for the Western District of Oklahoma. During the trial of the case there the parties thereto, the parties hereto, entered into an agreed statement of facts as to certain phases of the case (R. 44-49). On July 3, 1947, the trial court filed Findings of Fact and

Conclusions of Law (R. 49-52). On July 9, 1947, the petitioner filed a motion to amend, modify and enlarge said Findings of Fact and Conclusions of Law and make additional Findings of Fact and Conclusions of Law (R. 54-56). This motion was overruled on September 8, 1947, and judgment entered as of that date (R. 56-57). The judgment entered as of that date appears in the record at Pages 52 and 53; and from this judgment the plaintiff below, the petitioner here, prosecuted an appeal to the Circuit Court of Appeals, and that Court affirmed the judgment of the trial court.

II.

DECISIONS BELOW

The trial court did not file a formal opinion. Its Findings of Fact and Conclusions of Law, and Judgment based thereon, appear in the record at Pages 49 to 53. The Opinion of the Circuit Court of Appeals was filed on July 15, 1948 (R. 189-195), and reported in 169 Fed. (2d), Advance Sheet No. 6, October 18, 1948, Page 709. In due course the petitioner here, the appellant below, filed a petition for rehearing, which was denied on September 30, 1948 (R. 195-196). On October 11, 1948, the Mandate of the Circuit Court of Appeals (United States Court of Appeals) in accordance with the opinion and judgment of said Court was issued to the United States District Court (R. 196).

III.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as Amended by the Act of February 13, 1925, 43 Stat. 938, 28 USCA, Sec. 347 (a), and/or Chapter 133, Section 2101 (c), Title 28, United States Code, Judiciary and Judicial Procedure, approved June 25, 1948, effective September 1, 1948.

IV.

QUESTIONS PRESENTED

The following questions are presented:

(1) The letter contract of May 4, 1944, the lease contract of March 13, 1923, covering the Bruce 40 acres were subject to the provisions of the First War Powers Act, 1941, 50 USCA. Appendix, Section 601, *et seq.* and the Executive Orders and the Rules and Regulations issued thereunder as applied to the Petroleum industry. Said letter agreement of May 4, 1944, and lease agreement of May 15, 1944, constitute the contract between the petitioner and the respondents herein as to the leases covering the Bruce 40 acres. The words "necessary" or "may be necessary" run through each of said documents. Under these documents were the respondents under an implied obligation to present to the PAW a good faith application to complete and produce the Bruce No. 8 Well as a gas well on her 40 acres as a unit? They did not do so but presented an application to complete and produce said well as a gas well on an 80-acre unit—the Bruce 40 and the Lackey 40. Was this application a good faith one?

(2) Did the PAW order of June 29, 1945, involve or affect the 1/8 regular royalty of the petitioner as applied to her two leases and/or consolidate or reduce her interest therein?

(3) Did the PAW order of June 29, 1945, consolidate, affect, reduce or postpone her bonus obligation of $12,500.00 payable out of 1/8 of 7/8 of the gas production.

(4) Under said letter agreement of May 4, 1944, and the lease agreement of May 15, 1944, was the petitioner under obligation to execute and deliver the Communitization Agreement of July 25, 1945, communitizing her forty acres with the Lackey forty acres as an 80-acre unit?

V.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The reasons upon which petitioner relies for the allowance of the writ are as follows:

(1) The provisions of the First War Powers Act and the Executive Orders and the Rules and Regulations issued thereunder, as applied to the Petroleum Industry, are involved, and the Circuit Court of Appeals has decided an important question of Federal law which has not been but should be settled by this Court as applied to the letter agreement of May 4, 1944, and the lease agreement of May 15, 1944. There are kindred questions presented and decided by the Circuit Court of Appeals for the Fifth Circuit in the case of *Dillon* v. *Holcomb*, 110 Fed. (2d) 610, and the rule therein announced is in part, as we view it, in

conflict with the rule announced by the Circuit Court of Appeals of the Tenth Circuit in the instant case.

(2) If, however, there is no conflict between these two decisions, yet neverthless, under the rule as applied to non-conflict cases, this Court, in its discretion, may take jurisdiction, and the facts and circumstances are such as to justify this Court, in our judgment, in taking jurisdiction even though there is no conflict in the Circuits.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Tenth Circuit (United States Court of Appeals, Tenth Circuit) should be granted.

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December, 1948.

BRIEF IN SUPPORT OF PETITION

DECISIONS BELOW

The trial court did not file a formal opinion. Its Findings of Fact and Conclusions of Law, and Judgment based thereon, appear in the record at pages 49 to 53. The Opinion of the Circuit Court of Appeals was filed on July 15, 1948 (R. 189-195), and reported in 169 Fed. (2d), Advance Sheet No. 6, October 18, 1948, page 709. In due course the petitioner here, the appellant below, filed a petition for rehearing, which was denied on September 30, 1948 (R. 195-196). On October 11, 1948, the Mandate of the Circuit Court of Appeals (United States Court of Appeals) in accordance with the opinion and judgment of said court was issued to the United States District Court (R. 196).

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as Amended by the Act of February 13, 1925, 43 Stat. 938, 28 USCA, Sec. 347 (a), and/or Chapter 133, Section 2101 (c), Title 28, United States Code, Judiciary and Judicial Procedure, approved June 25, 1948, effective September 1, 1948.

STATEMENT OF THE CASE

The essential facts are contained in the respective pleadings, the agreed statement of facts, the exhibits, the findings of fact of the trial court, the opinion of the United States Court of Appeals, Tenth Circuit, and the summary

statement of the matter involved in Paragraph 1 of the petition for the writ sought, and we adopt them as such.

SPECIFICATIONS OF ERROR

(1) The United States Court of Appeals, Tenth Circuit, erred in holding that the respondents, under the letter agreement of May 4, 1944, and the lease agreement of May 15, 1944, were not under the implied contractual obligation to make and present a good faith application for an order to complete and produce Bruce No. 8 well as a gas well on the forty acres of the petitioner as a unit. The PAW Federal Agency was the sole authority to determine the unit area, and that Agency never had the opportunity to determine whether or not such well could have been completed and produced as a gas well on the forty acres of the petitioner as a unit.

(2) The PAW order of June 29, 1945, did not involve or affect the 1/8 regular royalty of the petitioner as applied to her two leases and/or consolidate or reduce her interest therein, and said Court of Appeals erred in holding, in effect, that said letter agreement and lease obligated the petitioner to execute the Communitization Agreement of July 25, 1945, communitizing her forty acres with the Lackey forty acres as an eighty-acre unit.

(3) The PAW order of June 29, 1945, did not consolidate, affect, reduce or postpone petitioner's bonus obligation of $12,500.00 payable out of 1/8 of 7/8 of the gas production, and said Court of Appeals erred in so holding.

(4) Under said letter agreement of May 4, 1944, and lease agreement of May 15, 1944, the petitioner

was under no obligation to execute and deliver the Communitization Agreement of July 25, 1945, communitizing her forty acres with the Lackey forty acres as an eighty-acre unit, and said Court of Appeals erred in not so holding.

SUMMARY OF THE ARGUMENT

Point I.

The United States Court of Appeals, Tenth Circuit, erred in holding that the respondents, under the letter agreement of May 4, 1944, and the lease agreement of May 15, 1944, were not under the implied contractual obligation to make and present a good faith application for an order to complete and produce Bruce No. 8 well as a gas well on the forty acres of the petitioner as a unit. The PAW Federal Agency was the sole authority to determine the unit area, and that Agency never had the opportunity to determine whether or not such well could have been completed and produced as a gas well on the forty acres of the petitioner as a unit.

Point II.

The PAW order of June 29, 1945, did not involve or affect the ⅛ regular royalty of the petitioner as applied to her two leases and/or consolidate or reduce her interest therein, and said Court of Appeals erred in holding, in effect, that said letter agreement and lease obligated the petitioner to execute the Communitization Agreement of July 25, 1945, communitizing her forty acres with the Lackey forty acres as an eighty-acre unit.

Point III.

The PAW order of June 29, 1945, did not consolidate, affect, reduce or postpone petitioner's bonus obligation of $12,500.00 payable out of 1/8 of 7/8 of the gas production, and said Court of Appeals erred in so holding.

Point IV.

Under said letter agreement of May 4, 1944, and lease agreement of May 15, 1944, the petitioner was under no obligation to execute and deliver the Communitization Agreement of July 25, 1945, communitizing her forty acres with the Lackey forty acres as an eighty-acre unit, and said Court of Appeals erred in not so holding.

ARGUMENT

Point I.

The United States Court of Appeals, Tenth Circuit, erred in holding that the respondents, under the Letter Agreement of May 4, 1944, and the Lease Agreement of May 15, 1944, were not under the implied contractual obligation to make and present a good faith application for an order to complete and produce Bruce No. 8 Well as a gas well on the forty acres of the petitioner as a unit. The PAW Federal Agency was the sole authority to determine the Unit Area, and that agency never had the opportunity to determine whether or not such well could have been completed and produced as a gas well on the forty acres of the petitioner as a unit.

The word "necessary" is the key word of the letter agreement of May 4, 1944, and the lease agreement of May 15, 1944. The PAW Federal Agency was the sole authority to determine the unit area and that Agency never had the

opportunity to determine whether or not the Bruce No. 8 gas well should be completed and produced as such on the forty acres of the petitioner as a unit. Under said letter and lease agreements the respondents were under the implied contractual obligation to prepare, present and make a bona fide application for authority to complete and produce Bruce No. 8 as a gas well on the forty acres of petitioner as a unit. They did not do so and therefore breached such implied obligation. The application which said respondents did prepare and present was a bad faith one, in that they and the Lackey royalty owners would benefit and profit at the expense of the petitioner.

(1) *Brooker Engineering Co.* v. *Grand River Dam Authority* (10th Cir.), 144 Fed. (2d) 708;

(2) *New York Casualty Co.* v. *Sinclair Refining Co.* (10th Cir.), 108 Fed. (2d) 65;

(3) *Cities Service Gas Co.* v. *Kelly- Dempsey & Co.* (10th Cir.), 111 Fed. (2d) 247;

(4) *Miller* v. *Miller* (10th Cir.), 134 Fed. (2d) 583;

(5) *Parev Products Co.* v. *I. Rokeach & Sons* (2d) Cir.), 124 Fed. (2d) 147;

(6) *G. T. Fogle & Co.* v. *United States* (4th Cir.), 135 Fed. (2d) 117;

(7) *Watson Bros. Transp. Co.* v. *Jaffa* (8th Cir.), 143 Fed. (2d) 340;

(8) *Sacramento Navigation Co.* v. *Salz*, 273 U. S. 326, 71 L. Ed. 663;

(9) 12 Am. Jur., Sec. 239, page 765;

(10) Vol. 5, Williston on Contracts (Revised Edition), Sec. 1293;

(11) 17 C. J. S., Sec. 4, page 317.

Point II.

The PAW Order of June 29, 1945, did not involve or affect the 1/8th regular royalty of the petitioner as applied to her two leases and/or consolidate or reduce her interest therein, and said Court of Appeals erred in holding, in effect, that said letter agreement and lease obligated the petitioner to execute the Communitization Agreement of July 25, 1945, communitizing her forty acres with the Lackey forty acres as an Eighty-Acre Unit.

On June 29, 1945, the date of said PAW order, the respondents owned the entire working interest of each of the three leases (two Bruce and one Lackey), the 80-acre unit, and the petitioner owned the regular 1/8 royalty under her forty acres. Said order of June 29, 1945, among other things, provides:

> "Provided that all property interests in the eighty-acre tracts upon which each well is located, as designated on the plat submitted with the application, are consolidated and assigned to that well" (R. 73).

In view of the above-quoted portion of said order it becomes necessary to ascertain what is meant by the words "all property interest". As we understand the Rules and Regulations in force at the time of the making of said order these words have to do only with the working interest and do not cover or include the regular royalty interest of the 80-acre unit, and the regular royalty interest of the petitioner was not affected in any way by said order.

Conservation Order M-68 was promulgated effective December 23, 1941, having to do with the conservation of production material for the oil industry (Title 32-National

Defense Chapter IX-Office of Production Management-Subchapter B-Part 1047). Under Subsection (7) of Section (c) —Exceptions, an oil well could be drilled on a uniform well spacing pattern of not more than one single well to each 40 surface acres, and under Subsection (8) of Section (c) a gas well could be drilled on a uniform well spacing pattern of not more than one single well to each 640 surface acres. This order was amended from time to time and said order, as amended, effective March 31, 1943, contains the following language:

> " 'Property Interest' means any interest of an oil or gas lease: *Provided*, that where no oil or gas lease exists on any parcel of land, the property interest in such land shall be deemed to be the aggregate of the interests in such land covering the right to drill for and produce petroleum" (Title 32—National Defense, Chapter XIII—Petroleum Administration for War—Section 1515.6—Petroleum Administrative Order No. 11 (b) (10). (Respondents' Exhibit "B").

Said order, as amended, effective January 1, 1944, provides:

> " 'Property Interest' means an interest in land which gives the owner of the interest the right to enter on the land and drill for or produce petroleum and obtain title to part or all of the production. Such interest is usually created by a deed or an oil and gas lease, and is commonly called a 'working interest'." (Title 32—National Defense Chapter XIII—Petroleum Administration for War—Section 1515.6—Petroleum Administrative Order No. 11 (b) (14). (Respondents' Exhibit "C").

Said order, as amended, effective July 1, 1944, provides:

> " 'Property Interest' means an interest in land which gives the owner of the interest the right to enter on the land and drill for or produce petroleum and obtain title to part or all of the production. Such interest is usually created by a deed or an oil and gas lease, and is commonly called a 'working interest'." (Title 32—National Defense Chapter XIII—Petroleum Administration for War—Section 1515.6—Petroleum Administrative Order No. 11 (b) (14). (Respondents' Exhibit "D").

The trial court, in its Finding of Fact No. 8 uses these words:

> "The order of the Petroleum Administration for War of June 29, 1945, while it may not require directly the consolidation of the Bruce and Lackey interest it did not affect the agreement or contractual obligation of the plaintiff to abide by necessary unitization" (R. 51).

There is not much controversy between the parties hereto with reference to the particular point we are discussing here and said Court of Appeals, in effect, held that such order upon its face did not consolidate and/or affect the regular royalty interest of the petitioner, but that said letter agreement of May 4, 1944, and lease agreement of May 15, 1944, constituted a consent upon her part to such consolidation, and was thereby under obligation to execute said Communitization Agreement of July 25, 1945.

Point III.

The PAW Order of June 29, 1945, did not consolidate, affect, reduce or postpone Petitioner's Bonus Obligation of $12,500.00 payable out of 1/8 of 7/8 of the Gas Production, and said Court of Appeals erred in so holding.

The respondents owned the entire working interest in the three aforesaid leases, and they could agree among themselves to consolidate their respective working interests therein without the consent and/or approval of the petitioner, and by so doing they would not be required to give up or surrender any of their working interest rights. In view of this fact said Court of Appeals erred in holding that her bonus payable out of 1/8 of 7/8 was reduced to 1/16 of 7/8. In connection with this Point and our Point II we cite *Dillon* v. *Holcomb* (5th Cir.), 110 Fed. (2d) 610, from which we quote Subdivision 2 of the Syllabus:

> "Where lessees pooled 4-acre tract and 6-acre tract in Louisiana for purpose of producing oil, lessor of 4-acre tract not consenting to reduction of amounts to be paid him under lease providing for usual one-eighth royalty, and additional overriding royalty and oil payment, was entitled to an accounting on basis of royalties and oil payments named in his lease."

If the respondents had not owned the entire working interest of these leases and had been compelled to go out and acquire or make arrangement with some one else who did own a portion of the working interest to consolidate such interest with theirs, then they might have had the right to reduce the petitioner's working interest production for application on her bonus or oil payment. The petitioners

are getting all of the working interest production from the 80-acre unit and the petitioner should receive her one-eighth of such working interest production.

Point IV.

Under said Letter Agreement of May 4, 1944, and Lease Agreement of May 15, 1944, the petitioner was under no obligation to execute and deliver the Communitization Agreement of July 25, 1945, communitizing her forty acres with the Lackey forty acres as an Eighty-Acre Unit, and said Court of Appeals erred in not so holding.

The Lackey forty acres joins the Bruce forty acres on the West. If permission had been given the respondents to complete and produce the Bruce No. 8 well as a gas well on her forty acres as a unit they would have been under obligation to drill an offset well on the Lackey forty acres or pay the royalty owners $250.00 a year in advance as gas royalty. By annexing the Lackey forty acres to the Bruce forty acres as an eighty-acre unit the respondents relieved themselves of drilling a gas well on the Lackey forty acres or paying the gas royalty of $250.00 per year. This was to their advantage. The Ramsey No. 1-A Cobb-Covey forty-acre lease joins the Lackey forty acres on the South and corners with the Bruce forty acres. If the Lackey forty acres had not been annexed to the Bruce forty acres the respondents would then have been under obligation to drill an offset well on the Lackey forty or pay the cash royalty of $250.00, and by annexing the Lackey forty to the Bruce forty as an eighty-acre unit they relieved themselves from this obligation. The record, in our judgment, presents the

situation by which the respondents have been benefited by annexing the Lackey forty to the Bruce forty as an eighty-acre unit to the prejudice of the petitioner.

The PAW Agency had the sole authority to determine the unit area. Neither the petitioner nor the respondents had any control over this Agency, and it was the implied duty of the respondents, as we believe, to undertake, in good faith, to secure a permit to complete and produce Bruce No. 8 well as a gas well. Not having done so, and having failed to make any effort whatever to complete and produce such well on her forty acres as a unit, then she is entitled to both her 1/8 regular royalty and 1/8 of 7/8 of the working interest production.

When an obligation to pay money is dependent on the action of a third person over whom neither party has any control, payment cannot be exacted unless the specified act is performed.

—*Gordon* v. *Pollock*, 124 Okla. 64. 253 Pac. 1021.

After the Bruce well came in as a gas well rather than an oil well there would not be much additional critical materials necessary to complete and produce the same as a gas well. There is evidence in the record dealing with this matter. The record discloses a similar situation as applied to the above mentioned Ramsey No. 1-A Cobb-Covey well. This well was drilled as an oil well but came in as a gas well, and the above mentioned Federal Agency granted permission to complete and produce the same as a gas well on a 40-acre unit. The application was filed on October 16, 1944, and granted on November 2, 1944. The action of said

Agency as applied to this well indicates, as we think, that if a good faith application had been filed by the respondents to complete and produce Bruce No. 8 as a gas well on her forty acres as a unit that the same would have been granted. The finding of the trial court to the effect that such an effort would have been useless and futile, approved by the Court of Appeals, is not supported by sufficient evidence, in our judgment; and under all the facts and circumstances as presented by the record, this Court should take jurisdiction, and reverse the judgment of the Court of Appeals.

Respectfully submitted,

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